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MEMORANDUM FOR THE RECORD

SUBJECT: Hearing Before the Subcommittee on Legislation and National Security, House Committee on Government Operations, on the Constitutionality of the General Accounting Office's (GAO) Bid Protest Function

1. The Subcommittee convened at 10:00 a.m. on 28 February 1985, in Room 2154 Rayburn. The following Members of the Subcommittee were present:

Jack Brooks (D., TX), Chairman
Don Fuqua (D., FL)
Frank Horton (R., NY)
David S. Monson (R., UT)

2. The Chairman opened the hearings by stating they were being held to determine the constitutionality of GAO's enforcing certain provisions of PL No. 98-369 (Competition in Contracting Act - CICA). He stated that there had been considerable opposition to these reforms from Executive Branch agencies within the Defense Department and also from some private industries. He further stated that at issue here was the separation of powers between the Legislative and Executive Branches and that the third branch is the one that should make the decision on whether a law is unconstitutional.

3. Chairman Brooks said that both the Director of the Office of Management and Budget and the Attorney General had been invited to testify, and that the Department of Justice was being uncooperative. March 7 has been set for Mr. Stockman to testify before the Subcommittee, if he is well enough to appear because of his recent illness.

4. Mr. Brooks submitted for the record a letter signed by himself, Congressman Fuqua, Senator Carl Levin of Michigan, and Senator William Cohen of Maine, all of whom support the legislation enacted, including the two provisions in the law which the Attorney General considers unconstitutional and the Executive Branch is not enforcing. The Attorney General's view is that the Act violates the separation of powers' doctrine by authorizing the Comptroller General (1) to lift the suspension of procurement action by issuing a protest decision, and (2) to award costs.

5. Mr. Bowsher, Comptroller General, was the first witness and he read his statement in its entirety (a copy of which is attached). This was followed by several questions put to him and his General Counsel, Mr. Harry R. Van Cleve, who responded they had found several areas in the Executive Branch where the intent of the law had been ignored, that it was causing some hardships in industry, but it is hard to determine how much uncertainty it is causing, and the situation is worsening. Mr. Van Cleve also commented that GAO does not as yet have sufficient data collected on bid protest cases, but they will be able to submit the information in about six weeks.

6. When asked if any court cases are coming up to test the constitutionality of the GAO's authority under the CICA, Mr. Van Cleve said a Navy contract case was filed in Los Angeles and a hearing for a preliminary injunction is set for 11 March. He also said that he could recollect no other instance where the Justice Department had rendered a decision that part of a law be declared unconstitutional.

7. Following GAO's testimony, the Constitutional Panel, comprised of three Professors of Law, jointly responded to queries on the Executive Branch taking upon itself to declare unconstitutional a law passed by the United States Congress. All were emphatic in their views that the Competition in Contract Act of 1984 is constitutional and represents the execution of Congressional power and oversight over the Executive Branch and its agencies. When asked what the Congress could do to get the law enforced, one professor said that if the law is unconstitutional there are other ways to determine it:

- test it in the Courts;
- impeach the President (which he felt most unlikely);
- withhold appropriations.

The Chairman grasped on to the last suggestion by saying that he has long been a member of the House Judiciary and that next week that Committee will deal with the Justice Department's appropriations--he is looking forward to that meeting.

A copy of the three statements submitted by the professors is also attached. None of them read any parts of their statements which had been submitted prior to the Hearing.

Liaison Division
Office of Legislative Liaison

Attachments
As stated

Distribution:

Original - OLL Record w/atts

1 - OLL Chrono w/o atts

1 - OGC [redacted] w/atts

1 - DDA(Attn: [redacted]) w/atts

1 - LD/OLL [redacted] w/o atts

LD/OLL [redacted] (5 March 1985)

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LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

Hearing on the Constitutionality of the
GAO's Bid Protest Function

Thursday, February 28, 1985
10:00 a.m.
2154 Rayburn House Office Building

SCHEDULE OF WITNESSES

General Accounting Office

The Honorable Charles A. Bowsheer
Comptroller General

Accompanied by: Mr. Milton J. Socolar
Special Assistant to the Comptroller General

Mr. Harry R. Van Cleve
General Counsel

Constitutional Law Panel

Professor Mark Tushnet
Georgetown University Law Center

Professor Sanford Levinson
University of Texas Law School

Professor Eugene Gressman
University of North Carolina Law School

American Bar Association

The Honorable Karen Hastie Williams
Chairman, Legislative Liaison Committee
Section of Public Contract Law
(Partner, Crowell & Moring)

Appearing with: Mr. George M. Coburn
Of Counsel, Sachs, Greenebaum & Tayler

National Tooling & Machining Association

Mr. William E. Hardman
President and Chief Operating Officer

Accompanied by: Mr. Bruce N. Hahn
Chairman-Elect, Small Business Legislative Council

Mr. Paul J. Seidman
Procurement Counsel

Computer and Communications Industry Association

Mr. A. G. W. Biddle
President

Accompanied by: Mr. David S. Cohen
Senior Partner, Cohen & White

Mr. P. David Pappert
President, ViON Corporation

Washington Post, Friday, 1 March 1985
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The Federal Triangle



CHARLES A. BOWSHER
... sees violation of Constitution

GAO Chief Assails Reagan's Stance On Bid Protests

Comptroller General Charles A. Bowsher yesterday accused President Reagan of violating the Constitution by defying a federal law designed to strengthen the General Accounting Office's role in handling bid protests.

The 1984 Competition in Contracting Act gave the GAO authority to hold up a federal contract if a valid bid protest was on file with government auditors. The Reagan administration views that provision as unconstitutional, and last year the Justice Department and the Office of Management and Budget ordered agencies to ignore it.

Yesterday, in testimony before the House Government Operations subcommittee on legislation and national security, Bowsher weighed into the simmering controversy by contending that "it is the president who has violated the separation of powers doctrine by defying a duly-passed act of the Congress through the actions of the attorney general and the director of OMB."

The administration has argued that the comptroller general, who heads the GAO under a fixed 15-year term, is a representative of the legislative branch and thus cannot hold up contracts awarded by the executive branch. Bowsher argued that he is an officer of the United States, appointed by the president and confirmed by the Senate, and not subject to the "whims" of congressional influence.

"Disobedience of the law is itself a matter of serious constitutional significance," Bowsher testified. "We cannot find any justification for the action taken to deliberately avoid the law in this case."

Bowsher's position was supported at the hearing by several constitutional law authorities, including a representative of the American Bar Association.

Eugene Grossman, a University of North Carolina law professor, said that the administration's action "constitutes a willful disobedience of the will of Congress. In our constitutional system of government, such a refusal by the executive to 'take care that the laws be faithfully executed' cannot and must not be tolerated."

The subcommittee has scheduled a second hearing next week to hear testimony from OMB Director David A. Stockman and Attorney Gen-